Chuah Tong Yeong v Kuala Lumpur Golf & Country Club Bhd

HIGH COURT (KUALA LUMPUR) — SUIT S3–22–485 OF 1998
ABDUL WAHAB J
8 MAY 2003

Contract *— Misrepresentation — Rescission — Representations made in brochure and prospectus — Whether case a suitable one for rescission*

The defendant was the developer and manager of the Kuala Lumpur Golf and Country Club. It issued a brochure and prospectus listing out facilities and features such as a library, gymnasium and health centre, 100 covered car parks, 500 open car parks, four tennis courts and a practice court. The plaintiff paid a sum of RM90,000 to become a member. The plaintiff later lodged a written complaint with the defendant over the non-existence of the listed facilities. The plaintiff thereafter sought a declaration for the anullment of his membership agreement, the return of the RM90,000 and damages. His suit was based on misrepresentation. He claimed that: (i) no library was provided; (ii) only a gymnasium and massage facility was provided; (iii) the 100 covered car parks were not provided and the number of open car parks were 100 less than represented; and (iv) no tennis and practice courts were built.

Held, declining an order for rescission but ordering compensation by way of damages:

(1) For an action in misrepresentation to succeed it must be shown that there was: (a) a representation; (b) the plaintiff was induced by it; (c) the representation was untrue; and (d) the case was one suitable for rescission. If the representation was merely innocent, the affected party would only be entitled to a rescission. Mere exaggeration is not representation but if it has the object and result of inducing an affected party, it is a representation (see p 582C–D); *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 198; *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 2 MLJ 500 and *Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd* [1998] 6 MLJ 448 referred.

(2) On the facts, the defendant had breached its representation to provide a library. However no real loss or damage was proven so as to provide the basis for consideration for any order on this ground. Although what the defendant provided was only a partial massage facility and gymnasium, there was a certain vagueness as the meaning of the term 'health centre', there was a certain vagueness as to the meaning of the term 'health centre'. The plaintiff's complaint on this ground had to fail due to a lack of definition as to the meaning of a 'health centre' (see p 582I).

(3) With regard to the absence of the tennis and tennis practice courts, there was no time frame stated for the provision and completion of those facilities. The prospectus stated that the expected dates of completion were tentative and were subject to changes. The inference was thus that the facilities would be provided within a reasonable time. There was also no representation that the DBKL building approvals had in fact been obtained. There was also no evidence that there was a lack of diligence on the part of the defendant in obtaining the DBKL approvals. Although there was a change in plans, the plaintiff did not state that the location of the tennis and practice courts was the, or was one of his major interests at the time he filed his application form. Thus the courts would not place much weight on his objection (see p 583A–E).

(4) It was not disputed that the 100 covered car parks were not provided and that the number of open car parks was 100 less than represented. However the real loss to the plaintiff was not shown and there was no evidence that as a condition of his purchase, the plaintiff would be provided with a covered car park. Further, there was also no evidence that as a result of the 100 less open car parks, the plaintiff would suffer not having a car park. Thus the failure to provide covered car parks was not material (see p 583F–G).

(5) While the complaints were borne out in part and constituted grounds for grievance, they were not major enough to warrant an order for rescission, but would warrant an order for compensation by way of damages (see p 583H).

[Bahasa Malaysia summary

Defendan adalah pemaju dan pengurus Kelab Golf dan Rekreasi Kuala Lumpur. Ia telah mengeluarkan satu brocur dan prospektus menyenaraikan kemudahan-kemudahan dan ciri-ciri seperti perpustakaan, gimnasium dan pusat kesihatan, 100 tempat letak kereta tertutup, 500 tempat letak kereta terbuka, empat gelanggang tenis dan satu gelanggang latihan. Plaintif telah membayar sejumlah RM90,000 untuk menjadi ahli. Plaintif kemudian telah membuat surat aduan kepada defendan terhadap ketiadaan kemudahan-kemudahan yang disenaraikan. Plaintif berikutan itu telah memohon satu deklarasi untuk satu pembatalan perjanjian keahlian beliau, pengembalian RM90,000 dan ganti rugi. Guaman beliau berdasarkan salah nyata. Beliau mendakwa bahawa: (i) tiada perpustakaan disediakan; (ii) hanya sebuah gimnasium dan kemudahan mengurut disediakan; (iii) 100 tempat letak kereta tertutup tidak disediakan dan jumlah tempat letak kereta terbuka kurang 100 daripada apa yang direpresentasikan; dan (iv) tidak ada gelanggang-gelanggang tenis dan latihan dibina.

Diputuskan, enggan membuat perintah untuk pembatalan tetapi memerintahkan pampasan diberikan melalui ganti rugi:

(1) Untuk satu tindakan dalam salah nyata untuk berjaya perlu dibuktikan bahawa terdapat: (a) satu representasi; (b) plaintif telah terpengaruh dengannya; (c) representasi tersebut tidak benar; dan (d) kes tersebut sesuai untuk pembatalan. Jika representasi tersebut suatu yang ikhlas semata-mata, pihak yang terjejas hanya berhak kepada satu pembatalan. Membesar-besarkan cerita semata-mata bukan satu representasi tetapi jika ia mempunyai tujuan dan akibat mempengaruhi pihak yang terjejas, ia adalah satu representasi (lihat ms 582C–D); *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 198; *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 2 MLJ 500 dan *Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd* [1998] 6 MLJ 448 dirujuk.

(2) Berdasarkan fakta-fakta tersebut, defendan telah melanggar representasinya untuk menyediakan sebuah perpustakaan. Namun begitu tiada kerugian atau kerosakan telah dibuktikan untuk memberikan suatu asas untuk dipertimbangkan untuk apa-apa perintah atas alasan ini. Walaupun apa yang defendan sediakan hanya sebahagian daripada kemudahan mengurut dan gimnasium, terdapat kekaburan terhadap maksud istilah 'pusat kesihatan'. Aduan plaintif atas alasan ini harus gagal kerana kurangnya penafsiran terhadap maksud sebuah 'pusat kesihatan' (lihat ms 582F–I).

(3) Berhubung ketiadaan gelanggan-gelanggang tenis dan latihan tersebut, tiada had masa yang dinyatakan untuk disediakan dan disiapkan akan kemudahan-kemudahan tersebut. Prospektus tersebut hanya menyatakan tarikh yang dijangkakan siap sebagai sementara dan tertakluk kepada perubahan. Inferensnya oleh itu adalah bahawa kemudahan-kemudahan tersebut akan disediakan dalam tempoh yang munsabah. Tidak terdapat juga representasi bahawa kelulusan-kelulusan bangunan DBKL telahpun diperolehi. Tiada juga bukti bahawa terdapat apa-apa usahan di pihak defendan untuk mendapatkan kelulusan-kelulusan DBKL. Walaupun terdapat perubahan dalam rancangan tersebut, plaintif tidak menyatakan bahawa lokasi gelanggang-gelanggang tenis dan latihan tersebut adalah, dan salah satu minat utama beliau pada masa beliau memfailkan borang permohonan. Oleh itu mahkamah tidak meletakkan beban yang banyak terhadap bantahan beliau (lihat ms 583A–E).

(4) Ia tidak dipertikaikan bahawa 100 tempat letak kereta tertutup tidak disediakan dan bahawa jumlah tempat letak kereta terbuka kurang 100 daripada apa yang direpresentasikan. Namun begitu kerugian sebenar plaintif tidak dibuktikan dan tiada keterangan bahawa sebagai satu syarat pembelian beliau, plaintif akan diberikan satu tempat letak kereta tertutup. Tambahan pula, tiada

juga keterangan bahawa disebabkan kurangnya 100 tempat letak kereta terbuka, plaintif tidak akan mempunyai tempat letak kereta. Oleh itu kegagalan untuk menyediakan tempat letak kereta tertutup tidak material (lihat ms 580F–G).

(5) Di mana aduan-aduan telah dibuat mengikut bahagian dan membentuk alasan-alasan untuk kilanan, ia tidak begitu penting untuk mewarankan satu perintah untuk pembatalan, tetapi akan mewarankan satu perintah untuk pampasan melalui ganti rugi (lihat ms 583H).]

Notes

For cases on rescission, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3889–3892.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500 (refd)

Letchemy Arumugan v N Annamalay [1982] 2 MLJ 198 (refd)

Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd [1998] 6 MLJ 448 (refd)

Legislation referred to

Companies Act 1965 s 90

Rimi bin Abdul Rahman (*CK Leong & Nurbayua*) for the plaintiff.
Robert Lazar (*Shearn Delamore & Co*) for the defendant.

Abdul Wahab J:

The agreed facts

The defendant is a company with a business address at No 10, Jalan 1/70D, Off Jalan Bukit Kiara, 60000 Kuala Lumpur. The defendant is a developer of and manages a golf and country club known as Kuala Lumpur Golf and Country Club ('the Club').

The Club has issued a brochure (as referred to at pp 332–350 of the agreed bundle of document (Section 1)). Facilities and features of the Club as listed in the said brochure included, inter alia, library, health centre, 100 covered car parks, 500 open car parks, four tennis courts and a practice court.

At the material time, the Club had also issued a prospectus (as referred to at p 360 of the agreed bundle of document (Section 1)). Facilities and features of the Club as stated in the said prospectus shall include, inter alia, library, health centre, 100 covered car parks, 500 open car parks, four tennis courts and a practice court.

A The plaintiff had applied to become a member of the Club by filling up an application form provided by the Club (as referred to at pp 28–30 of the agreed bundle of document (Section 1)].

The defendant has on 9 August 1993 accepted the plaintiff's application to become a member of the Club (as referred to at p 29 of the B agreed bundle of document (Section 1)].

The purchase value of Individual License Certificate (membership) of the Club applied by the plaintiff is RM90,000. The plaintiff has paid a down payment of RM 15,000 when submitting the application form to the Club. The balance of RM75.000 was paid to the Club by way of a fixed loan obtained by plaintiff from D & C Bank.

C The Club has issued statements under s 90 of the Companies Act 1965 dated:

(i) 18 March 1993 (as referred to at pp 1–27 of the agreed bundle of document (Section 1));

D (ii) 30 September 1993 (pp 38–91 of the agreed bundle of document (Section 1));

(iii) 14 April 1994 (pp 113–160 of the agreed bundle of document (Section 1));

(iv) 6 May 1997 (pp 164–237 of the agreed bundle of document E (Section 1)]; and

(v) 13 April 2002 (pp 246–359 of the agreed bundle of document (Section 1)]

which were circulated to all club members providing detail account of the Club's state of finance, facilities and development progress.

F To date, 100 covered car parks, four tennis courts and a practice court have not been constructed at the Club.

The plaintiff had lodged a written complaint to the defendant regarding the non-existence of the above-said facilities in his letter dated 4 April 1997 (as referred to at p 163 of the agreed bundle of document G (Section 1)).

The Club has a gymnasium with shower, changing rooms and sauna facilities and 440 open car parks.

By this action, the plaintiff seeks orders as follows:

H (i) a declaration that the agreement for the purchase of membership be annulled;

(ii) return of RM90,000; or alternatively

(iii) damages;

(iv) interest; and

I (v) costs.

His complaint is based upon misrepresentation as follows:

(i) LIBRARY: the brochure and prospectus represented that there will be a library, but no library is provided.

(ii) HEALTH CENTRE: the brochure represented that there will be a gymnasium and a health centre but only a gymnasium and a massage facility was provided.

(iii) CAR PARKS: the brochure represented there will be 110 covered car parks and 500 open car parks.

(iv) TENNIS AND A PRACTICE COURT: the brochure represented there will be four tennis courts and one practice court between the driving range and the clubhouse, but none was provided.

It is trite law that for such action in misrepresentation to succeed it must be shown there was: (i) a representation; (ii) the plaintiff was induced by it; (iii) the representation is untrue; and (iv) it is a suitable case for recission. To recover damages, loss must be proven: *Letchemy Arumugan v N Annamalay* [1982] 2 MLJ 198. If the representation was merely innocent, the affected party is entitled only to a recission: *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd & Anor* [1999] 2 MLJ 500 at p 508 (CA). It is equally trite that mere exaggeration is not representation, but if it has the object and result of inducing an affected party, it is a representation: *Low Kon Fatt v Port Klang Golf Resort (M) Sdn Bhd* [1998] 6 MLJ 448.

Library

The Managing Director of the defendant Club testified that a reading room with seating for ten and supplied with newspapers, magazines and some books on golf were provided. I find it telling that the managing director himself described it as a reading room. A premier golf and country club with facilities for the family, as the Club purports to be in its brochure and prospectus, be said to have complied with its representation for a library by providing library facilities only for the golfers, and leaving the family to newspapers only.

I found, therefore, that the defendant had breached its representation to provide a library. However, no real loss or damage was proven so as to provide the basis for consideration for any order on this ground.

Health centre

The defendant's submission drew difference between health centre and health club relying upon the *New Shorter English Dictionary*. Clearly, a gymnasium was considered not a health centre in this case because the health centre was stated separately from a gymnasium. The plaintiff's complaint is the failure to provide an integrated facility of gymnasium and health centre. What are provided are a partial massage facility and a gymnasium.

But there is certain vagueness as to meaning of the term 'health centre'. The plaintiff's complaint on this ground of a lack of definition as to the meaning of a health centre must, therefore, fail.

Tennis and tennis practice courts

It is accepted tennis and tennis practice courts have not been provided. But the defendant asserts these facilities will be provided, but at a different location and not at the location as in the brochure.

The brochure states these facilities are located between the driving range and the clubhouse. There is no time frame stated for the provision and completion of these facilities. In fact, there is a qualification that list of facilities are accurate as at time of the statement. The prospectus of March 1993 states that expected dates of completion are tentative. But 'and may be subject to changes' in the context used refers to changes in the expected date of completion and the Club only promised best efforts to comply but shall not be liable for delay. The inference must be it will be provided within a reasonable time. There is no representation that the building approvals had in fact been obtained.

There is also no evidence there is a lack of diligence on the part of the defendant in obtaining the approvals from DBKL. It is clear the probable cause of delay arises from delays in approval from DBKL if the facility is to be built near the original location as that part included resort homes, commercial complexes, multi-purpose centre, and a sports complex, which necessitated DBKL's approval. In fact, DW1 said the defendant intended to build the facilities elsewhere that does not require DBKL's approval.

Given that there is a change in plans, the next question to consider is how this affects the plaintiff. The plaintiff did not state the location of the tennis and tennis practice courts was the, or was one of his major interests at time he filled his application form. In the circumstances, I would not place much weight on this objection.

Car parks

It is not disputed the 110 covered car parks was not provided. Clear DW1 said there would be no covered car parks. It is also not disputed that the number of open car parks provided is 100 less than represented. On the face of it, the objection is borne out by the facts.

But real loss to the plaintiff is not shown. There is no evidence it is a condition of his purchase that he would be provided with a covered car park. There is no evidence that, as a result of the 100 less open car parks, the plaintiff would suffer not having a car park. I would not, therefore, consider the failure to provide covered car parks as being material.

Conclusion

While the complaints are in part borne out, and are grounds for grievance, I do not consider the misrepresentations to be matters of major or decisive consideration to the Plaintiff in his purchase decision as to warrant an order of recission, but would warrant an order for compensation by way of damages, if any.

I have, therefore, ordered that damages, if any, to be assessed before registrar. Interest at 8% upon usual terms.

Party to party and client-solicitor costs to be paid by the defendant. A

Order for rescission declined. Compensation by way of damages ordered.

Reported by Andrew Christopher Simon

B

C

D

E

F

G

H

I